1981

# Eddy N. Betenson, et al. v. Call Auto & Equipment Sales, Inc., a Utah Corporation, et al. and Eugene L. Lowin and Geneva Lowin v. Call Auto & Equipment Sales, Inc., a Utah Corporation, et al. : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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EDDY N. BETENSON, et al.,

Plaintiffs-Appellants,

vs.

CALL AUTO & EQUIPMENT SALES, INC., a Utah corporation, et al.,

Defendants-Respondent.

CASE NO. 17600

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EUGENE L. LOWIN and GENEVA LOWIN,

Plaintiffs-Appellants,

vs.

CALL AUTO & EQUIPMENT SALES, INC., a Utah corporation, et al.,

Defendants-Respondent.

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APPEALS FROM JUDGMENTS
OF THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, UTAH
HONORABLE JAMES S. SAWAYA, JUDGE

# BRIEF OF RESPONDENT

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## CASES CITED



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# RESPONDENT'S BRIEF

## STATEMENT OF CASE

This is a consolidation of two actions, alleging breach of contract, fraud, and violation of state securities laws brought by investors in a heavy equipment business. With respect to Respondent Fireman's Fund Insurance Company (hereinafter "Fireman's Fund"), the actions are for recovery under a motor vehicle dealer's bond.

## DISPOSITION IN LOWER COURT

The trial court granted respondent's motions to dismiss and denied appellants' motions for reconsideration or modification. No judgments have been entered by the lower court with respect to any defendants other than respondent Fireman's Fund.

## RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Court affirm the final judgments entered by the lower court.

## STATEMENT OF FACTS

Appellants allege defendants Call Auto & Equipment Sales, Inc., Call Call, Inc. and Barlow Enterprises, Inc. were engaged in the business of purchasing, refurbishing and selling heavy construction equipment. They further allege defendants Elroy Barlow, Timothy Barlow, Elroy Barlow, Jr. and L. A. Campbell were officers, directors and shareholders of the corporate defendants and "dominated and controlled the corporate defendants such that the corporate defendants were merely their alter-ego, and the separate entity of the corporations should be disregarded . . ." (R. 3)[1]

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[1] As stated in footnote 2, page 2 of Appellants' Brief, the allegations of the complaints in the two actions, insofar as relevant to these appeals, are the same. All cites are to the Betenson record, unless the Lowin record is expressly designated.

During 1979 and 1980, defendant Elroy Barlow allegedly solicited appellants to invest money with said defendants. (R. 4) The basis of their investments is set forth in paragraph seven of the Betenson Complaint as follows:

> In or about August 1979 defendant Elroy T. Barlow, acting on behalf of all defendants, solicited plaintiff Betenson for the purpose of raising funds for the corporate defendants. At that time, said defendant represented to Betenson that defendants were engaged in the business of purchasing, refurbishing and selling heavy construction equipment and were in immediate need of funds to purchase certain equipment which could be refurbished and sold at substantial profits. Said defendant represented to Betenson that if he would invest funds for a joint venture to purchase, refurbish and sell such equipment, that such investment would at all times be fully secured by various personal property and equipment of the corporate defendants and that Betenson would receive a guaranteed profit for his investment. (R. 3).

Each investment was represented by a written agreement. The written agreements were identical in form; copies are attached as Exhibits A, B, C, D, F, G, and H to the Betenson Complaint and Exhibit A to the Lowin Complaint.[2] The agreements provide in pertinent part:

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[2] Exhibit F is alleged in paragraph 39 of the Betenson Complaint, but the exhibit is not attached to the complaint contained in the record.

WHEREAS, SECOND PARTY has approached first party for the purpose of entering into an investment in their business as a type of joint venture, and;

WHEREAS, each of the parties have obtained independent legal counsel and are fully aware of this business transaction;

* * * *

1. FIRST PARTY herewith pays over to SECOND PARTY the sum of $_____ cash to be used by SECOND PARTY in buying and selling various types of personal property and equipment at a profit in its business.

2. SECOND PARTY agrees and guarantees to pay over to the FIRST PARTY, as his or her share of the profits and investment, the following sums of money on the following dates: . . . (R. 20)

The agreements further provide that the investments are to be secured by personal property and equipment, but that such property can be dealt with at a profit by the defendants if they deem it expedient and proper. Each agreement also contains a renewal clause, continuing the investments under the same terms for specified periods of time if the parties so wish.

Appellants allege breach of contract, fraud and a violation of state securities laws with respect to each of the agreements, and specifically allege that they entered into the agreements and invested their money in reliance on the representations of defendant Elroy Barlow set forth in paragraph 7 of the Betenson Complaint.

Appellants' claim against Respondent Fireman's Fund is based on a motor vehicle dealer's bond which it issued to defendant Call Auto.

## ARGUMENT

### POINT I

### APPELLANTS WERE PARTICIPANTS IN A JOINT VENTURE WITH DEFENDANTS AND THEREFORE CANNOT RECOVER AGAINST THE DEALER'S BOND

Appellants rely on Section 41-3-18 Utah Code Ann. (1953), as amended, for their cause of action against respondent. This section provides a cause of action against motor vehicle dealers and their sureties in favor of persons damaged by reason of the dealer's fraud or violation of the provisions of the Utah Motor Vehicle Act.

The trial court held the right of action provided in §41-3-18 does not apply to appellants because they were engaged in a joint venture with the defendants. This ruling is supported by Utah case law. In Bates v. Simpson, 121 Utah 165, 239 P.2d 749 (1952) this court impliedly held that a joint venturer with the principal on a dealer's bond cannot recover against the bond. The reasoning of Bates, and of the trial court in this case, is sound. The dealer's bond statutes are intended only to protect members of the public who deal with the dealer in a commercial capacity. To allow a joint venturer to recover against the

principal's bond allows the joint venturer, in essence, to recover against his own bond.

Appellants concede they are not entitled to recover against the bond if their relationships with defendants were joint ventures, but argue their transactions with defendants were loans. The issue before this court on appeal is whether the lower court erred in finding as a matter of law that appellants' agreements with defendants were joint ventures rather than loans. The trial court's ruling was correct and should be affirmed for the following reasons:

A. Appellants Have Judicially Admitted They Were Joint Venturers.

Appellants, by their own admissions, were engaged in joint ventures with the defendants. In paragraph 7 of the Betenson Complaint, appellants allege:

> Said defendant represented to Betenson that if he would invest funds for a joint venture to purchase, reburbish and sell such equipment, . . . Betenson would receive a guaranteed profit for his investment. (R. 3).

In paragraph 8 of the Betenson complaint, appellents allege that the investments alleged in the complaints, as represented by the agreements attached as exhibits to the complaints, were made "in reliance upon such representations". Accordingly, appellants admit they made their investments and signed the agreements with the understanding that they

would be engaged in a joint venture with the defendants to purchase, refurbish and sell equipment to make a profit.

The allegations of joint ventures in the complaints are binding judicial admissions and appellants cannot now assert a position directly contrary to their pleadings. As stated in 4 Wigmore on Evidence (3rd ed.) 45, §1064:

> The pleadings in a cause are, for the purposes of the use in that suit, not mere ordinary admissions . . . but judicial admissions, . . .; i.e., they are not means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues.

The principle stated by Wigmore regarding judicial admissions in pleadings has been applied by this court. In Estate of Clarence Henry McFarland v. Holt, 18 Utah 2d 127, 417 P.2d 244 (1966), the executrix under a will sought to set aside an order confirming the sale of real property which had been entered pursuant to her own petition. The lower court denied the motion and this court affirmed, holding:

> One who files a pleading asking the court to act thereon vouches for its verity and should not thereafter be permitted to repudiate it for the purpose of upsetting the action the court has taken pursuant to his request. Id. at 245.

Other jurisdictions have also applied this principle. In Myers v. Carter, 556 P.2d 703, (Or. 1976) the trial court was reversed for submitting an issue to the jury which was

admitted in a letter attached to and incorporated in the plaintiff's complaint. The Oregon court held:

> Statements contained in the pleadings are considered conclusive judicial admissions. (Citations omitted) Thus, whatever evidence may have been adduced at trial, the facts contained in that letter are conclusively established. Id. at 707.

As stated in the above authorities, plaintiffs' allegations of joint ventures in their pleadings are not merely evidence which they may now refute with contrary claims, but are admissions which remove all controversy as to the relationship between appellants and the defendants. Based on appellants own pleadings there is no issue to be determined by the court or submitted to a jury concerning the relationships between appellants and defendants. It is conclusively established by appellants' judicial admissions that the relationship between the parties was that of joint venturers.

B. Appellants Are Bound by the Terms of the Written Agreements.

Appellants contend that although the written agreements expressly provide for a joint venture, they should be allowed to introduce evidence that the parties to the agreements intended otherwise. Appellants recite several factual allegations in their brief attempting to show intent contrary to the express provisions of the agreements. (Appellants' Brief, pp. 16-17) They also cite the cases of Bender v. Bender,

397 P.2d 957 (Mont. 1965), Porter v. Moore, 300 P.2d 513 (Mont. 1956) and Vineland Homes v. Barish, 292 P.2d 941 (Cal. App. 1956) in support of their argument that the intent of the parties rather than the express provisions of the written agreements should govern. Each of those cases is distinguishable from the factual setting presented by this appeal. Bender and Porter involve disputes between the parties to the alleged partnership agreement. Vineland Homes involves an oral partnership agreement, the terms and existence of which must, of necessity, be proved by parol evidence.

In this case, respondent is not a party to the written agreements executed by appellant which created the joint ventures. Although the intention of the parties to a contract may govern their contractual relationship, as to third parties the express language of the contract governs. James Weller, Inc. v. Hansen, 517 P.2d 1110 (Ariz. App. 1973); Stearns v. Williams, 240 P.2d 833 (Idaho 1952); Lepel v. Lepel, 456 P.2d 249 (Idaho 1969).

In James Weller, Inc. v. Hansen, supra, plaintiffs Hansen and Cherokee Construction Company were involved in several real estate transactions. Cherokee deeded property to Hansen, who obtained financing to build thereon. Hansen deeded the property back to Cherokee, which started construction and contracted with Weller to perform dry wall and paint-

ing work. After construction was completed, Cherokee deeded the property back to Hansen. Subsequently, Weller filed a mechanics lien, naming Cherokee as owner. Cherokee received timely notice, but Hansen did not receive notice of the lien until three months later. After receiving notice of the lien, Hansen brought an action against Weller to quiet title and Weller counterclaimed to foreclose its lien. Hansen defended the counterclaim on the grounds that he had not received proper and timely notice of the lien. Weller contended that a joint venture existed between Hansen and Cherokee and the notice to Cherokee was therefore adequate notice to Hansen. The lower court granted judgment to Hansen, but the Appellate Court reversed, holding that a joint venture did exist as to Weller, a third party. The court stated:

> While the intent of the parties is essential as between the parties, where there is a clear and unambiguous contract, as here, the contract controls as to Weller, a third party.
>
> * * * *
>
> . . . The intent of the contracting parties to form a partnership is always an essential element of a partnership relation as between the parties themselves, but as to third parties, the relation will be determined from the facts rather than the conclusions of the co-partners as to the nature of their business relationship.

Id., 517 P.2d at 1114-15, citing Mercer v. Vinson, 336 P.2d 854, 858 (Ariz. 1959).

The agreements in the present case are consistent and unambiguous. They expressly provide that the purpose of the agreements is "entering into an investment . . . as a type of joint venture." Consistent with that purpose the agreements provide that the investments are to be used "in buying and selling various types of personal property and equipment at a profit" and that appellants are to receive certain payments "as his or her share of the profits and investment." There is no uncertainty or ambiguity on the face of the agreements as to the nature of the relationship between the parties thereto. Accordingly, as to third parties such as respondent, appellants are bound by the express provisions of the agreements which they voluntarily signed while being represented and advised by counsel.

It is apparent from the agreements that particular care was taken in structuring the transactions and drafting the agreements as joint ventures so as to avoid the appearance of a loan. The terms "joint venture," "investments" and "profits" were specifically used in the agreements and terms such as loan, debt, note and interest are noticeably absent in the agreements. Although appellants' brief alleges notes were signed "in some cases," according to the pleadings a note was signed in connection with the agreements in only one instance. In that case, the note does not conform to

the agreement with respect to the dollar amount and the interest rate is conspicuously left blank. (R. 26-28).

The reasons the agreements specify joint ventures rather than loans are not totally clear from the record, but it is significant that the agreements, if deemed loans, would provide interest rates ranging from 30% to 120% per annum. Whatever the reasons for establishing joint ventures rather than loans, the written agreements are clear and unambiguous and govern as to third parties such as respondent.

## POINT II

### APPELLANTS ARE NOT ENTITLED TO LEAVE TO AMEND THEIR COMPLAINTS AND THE TRIAL COURT DID NOT ERR IN DENYING THEIR MOTION FOR RECONSIDERATION

After the trial court entered the orders dismissing the complaints, appellants filed a Motion for Reconsideration or Modification of Order Granting Motion to Dismiss. The trial court's denial of that motion was correct and should be affirmed for the following reasons:

A. Leave to Amend the Complaints was Not Timely Sought.

Appellants did not move for leave to amend their complaints prior to entry of the orders of dismissal. Appellants have never filed a proper motion for leave to amend the complaints. Nevertheless their Motions for Reconsideration state as a ground for the motions that they are entitled to

amend the complaints. This court has twice held that leave to amend a complaint will not be granted after an action has been dismissed. Nichols v. State, 554 P.2d 231 (Utah 1976); Steiner v. State, 27 Utah 2d 284, 495 P.2d 809 (1972).

In Nichols v. State, supra, the plaintiff filed a motion for leave to amend her complaint after the defendants' motion to dismiss had been granted. The trial court denied the motion for leave to amend and this court affirmed, holding:

> Utah has adopted the majority rule that an order of dismissal is a final adjudication, and thereafter, a plaintiff may not file an amended complaint. Id. at 232.

Assuming, arguendo, appellants' motion for reconsideration is considered a motion for leave to amend, it was not timely and the trial court was correct in denying the motion.

B. Appellants' Motions for Reconsideration Are Not Proper Motions.

After entry of the orders dismissing their complaints, appellants filed Motions for Reconsideration on the alleged grounds that substantial evidence and authorities existed which had not been brought to the attention of the trial court. The motions did not purport to be made pursuant to Rules 59 or 60, Utah Rules of Civil Procedure, and none of the grounds for post-judgment relief under those rules were asserted.

In Drury v. Lunceford, 18 Utah 2d 74, 415 P.2d 662 (1966) the district court entered judgment in favor of the plaintiff in an automobile accident case. Two months later the judge granted defendants' motion for new trial. The plaintiff then filed a motion to reconsider and set aside the order granting new trial. That motion was granted and the original judgment reinstated by the trial court. On appeal, this court reversed and remanded the case to the trial court for a new trial, holding:

> It is significant that our Rules of Civil Procedure do not provide for a motion for the trial court to reconsider or to review its ruling. . . Undoubtedly this is advisedly so. . . .
>
> When this has been done and the court has ruled upon the motion, if the party ruled against were permitted to go beyond the rules, make a motion for reconsideration, and persuade the judge to reverse himself, the question arises, why should not the other party who is now ruled against be permitted to make a motion for re-re-consideration, asking the court to again reverse himself?
>
> In order to avoid such a state of indecision for both the judge and the parties, practical expediency demands that there be some finality to the actions of the court, and he should not be in the position of having the further duty of acting as a court of review upon his own ruling.

Id. 415 P.2d at 663-64.

Although the trial court did hear appellants' motions for reconsideration, before denying them, it could have properly denied the motions without hearing.

C. Appellants' Proposed Amendments Would Directly Contradict Their Original Pleadings, Which Are Judicial Admissions.

Appellants argue they should be granted leave to amend their complaints to allege that the transactions between them and defendants were loans and not joint ventures. This is not a case of appellants having merely omitted an allegation essential to state a claim. Appellants pled the transactions as joint ventures and submitted the matter for decision to the lower court upon the premise that a joint venturer is entitled to recover against a dealer's bond. By the trial court's decision, appellants discovered they were not entitled to recover against respondent based on the facts pled. Failing there, appellants now want to change horses in midstream. They now argue they should have been allowed to amend their complaints to plead facts in direct contradiction to the facts pled in their original complaints.

The granting or denying of leave to amend is a matter within the discretion of the trial court and its ruling will be reversed only upon a finding that it abused its discretion. Wilson v. Lambert, 613 P.2d 765 (Utah 1980); Department of Social Services v. Romero, 609 P.2d 1323 (Utah 1980); Hoover Equipment Co. v. Smith, 198 Kan. 127, 422 P.2d 914 (1967). The trial court certainly did not abuse its discretion in denying appellants leave to amend their complaints to plead facts directly contrary to their prior admissions.

D. Even if Appellants Had Been Granted Leave to Amend Their Complaints to Allege Loans Rather Than Joint Ventures, They Would Not Be Entitled to Recover Against the Dealer's Bond Because the Transactions, If Loans, Were Illegal and Unconscionable.

Under the Utah enactment of the Uniform Consumer Credit Code, §70B-3-602(1) Utah Code Ann. (1953), as amended, appellants' agreements with the defendants, if deemed loans, would be consumer related loans. Consumer-related loans to persons other than organizations are usurious and illegal if the finance charge exceeds 18%. §70B-3-201(1) and §70B-3-602(2). Appellants allege that the individual defendants, at all relevant times, dominated and controlled the corporate defendants such that the corporate defendants were merely their alter-ego and the separate entity of the corporations should be disregarded in this action. (R. 2, 3).

Based on the agreements incorporated in the complaints, appellants were to receive interest at the following rates if the transactions are deemed loans:

Eddie N. Betenson
120% per annum on $7,000 - Exhibit A to Betenson Complaint
60% per annum on $10,000 - Exhibit B to Betenson Complaint
60% per annum on $2,000 - Exhibit C to Betenson Complaint

Gregory Johnson
120% per annum on $900 - Exhibit D to Betenson Complaint

Alice Adams
60% per annum on $2,000 - No exhibit

Randall Adams
60% per annum on $6,000 - Exhibit G to Betenson Complaint
45% per annum on $10,000 - Exhibit H to Betenson Complaint

Eugene and Genevia Lowin
30% per annum on $30,000 - Exhibit A to Lowin Complaint

Usurious loans are void and unenforceable. Ross v. Producers Mutual Insurance Co., 4 Utah 2d 396, 295 P.2d 339 (1956). See also §70B-5-301, Utah Code Ann. (1953), as amended, which makes it a misdemeanor to willfully charge more than the usury limit.

Since appellants' agreements with defendants, if deemed loans, are unenforceable, appellants would have no right to recover against the bond. Otherwise, appellants would benefit from their own illegal acts. Furthermore, respondent, as surety, cannot be held liable on the basis of a transaction or obligation which cannot be enforced against its principal. Accordingly, the trial court was correct in not allowing appellants to amend the complaints to allege their agreements were loans rather than joint ventures.

## CONCLUSION

The trial court's ruling that appellants were engaged in joint ventures and are therefore not entitled to recover

against the bond was correct and should be affirmed for two reasons:

1. Appellants admitted in their pleadings that they invested money in joint ventures with the defendants. These allegations in the complaints constitute judicial admissions. Accordingly, there was no issue before the trial court as to the nature of the relationships between appellants and the defendants and the court properly applied the law to the facts as established by appellants' own pleadings.

2. The written agreements between appellants and the defendants were placed before the court by appellants. Those documents expressly provide, without ambiguity, that the agreements between appellants and the defendants are joint ventures and not loans. As to third parties such as respondent, the terms of the written agreements govern and appellants are not entitled to contradict those terms by extrinsic evidence of their intent.

The trial court properly denied appellants' motion for reconsideration for the following reasons:

1. To the extent appellants were requesting leave to amend their complaints by the motion for reconsideration, their request was untimely. Leave to amend a complaint cannot be granted after the complaint has been dismissed.

2. Motions to reconsider are not recognized under the Utah Rules of Civil Procedure and this court has expressly held that such motions are improper.

3. Appellants' proposed amendments would directly contradict the judicial admissions made in their original complaints. The trial court did not abuse its discretion in refusing to allow appellants to amend their complaints to plead facts directly contrary to facts already admitted.

4. Appellants' agreements with the defendants, if deemed loans rather than joint ventures, were usurious and illegal. It is no wonder such care was taken in the drafting of the agreements between appellants and defendants to avoid the appearance of loans, in view of the fact that the interest rates would have been up to 120% per annum.

DATED this 22nd day of July, 1981.

Respectfully submitted,

SNOW, CHRISTENSEN & MARTINEAU

By _____
David G. Williams

By _____
Bruce H. Jensen
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) copies of the within Brief of Respondent to Stephen B. Mitchell, at Burbidge, Mabey & Mitchell, Attorneys for Appellant, at 438 East 200 South, Suite 1, Salt Lake City, Utah 84111, postage prepaid in the United States Mail, this 22nd day of July, 1981.

Bruce Jensen
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